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Supreme Court, U.S.
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In The
Supreme Court of the United States

LATANUA RUDD,

Petitioner,

v.

SHELBY COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

LES JONES
DAVID E. GOODMAN, JR.
BURCH, PORTER AND JOHNSON
130 North Court Avenue
Memphis, TN 38103
(901) 524-5000

ERIC SCHNAPPER*
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where an employee has been the victim of sexual harassment by a *co-worker*, is the standard for determining employer liability under Title VII:

(1) the rule in the Sixth Circuit, which requires the plaintiff to prove that the employer failed to deal in "good faith" with the harassment, or

(2) the rule in a majority of the courts of appeals, under which a plaintiff need only establish that the employer was guilty of negligence in failing to prevent or correct the harassment?

PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Latanua Rudd respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on January 5, 2006.

OPINIONS BELOW

The January 5, 2006, opinion of the court of appeals, which is not officially reported, is reprinted at 2006 WL 20555 (6th Cir.), and is set out at pp. 1a-4a of the Appendix. The March 23, 2006, order of the court of appeals denying rehearing, which is not officially reported, is set out at p. 20a of the Appendix. The January 26, 2004 opinion of the district court, which is not officially reported, is set out at pp. 5a-19a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on January 5, 2006. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 23, 2006. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 701(b) of Title VII, 20 U.S.C. § 2000e(b), provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agency of such a person. . . .

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

STATEMENT OF THE CASE

A federal jury found that the petitioner, Latanua Rudd, had been the victim of sexual harassment by a co-worker, in violation of Title VII of the 1964 Civil Rights Act. The harasser struggled at length with petitioner, repeatedly rubbed his body (and penis) against petitioner's body, handcuffed her to an office filing cabinet, and taunted her over the office intercom system. Several Sheriff's Deputies, including two supervisors, were aware at the time that this abuse was going on, and did virtually nothing to assist petitioner. The courts below agreed that the harassment was sufficiently serious to create an unlawful hostile work environment. The Sixth Circuit nonetheless overturned the jury verdict, applying that circuit's well-established but idiosyncratic rule that employers are not liable for co-worker harassment unless the employer failed to act in "good faith."

This case arises out of a campaign of gender-based harassment and physical abuse that openly continued over a period of three to four hours[1] at an office of the Shelby County Sheriff's Department.[2] The petitioner was at that time a Deputy Sheriff in the Sheriff's Department. The harasser was Sergeant Lance Burton, who outranked petitioner but was not her supervisor.

The harassment occurred throughout the evening of December 22, 2000, at the part of the office occupied by the Fugitive Transportation Division. Most of the events occurred in or near petitioner's cubicle, and were visible and/or audible to other law enforcement officers present in the area throughout the period, several of them less than a dozen feet away.[3] Burton entered petitioner's cubicle, and began to struggle with her, rubbing his body and penis against her neck, hips and buttocks.[4] Petitioner attempted to push Burton away, repeatedly told him loudly to stop and called in vain for the other officers in the room to assist her.[5]

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[1] Tr. 127, 128.

[2] Shelby County includes the City of Memphis.

[3] Tr. 64.

[4] Tr. 61 ("He came over to me at the back of my chair, I felt his hands reaching right around my shoulder blades and I feeled [sic] what felt like his penis on the back of my neck area."), 62 ("And while we were fighting, I could feel his penis on the back of my hip, my butt area, and I am trying to lean my body outward to keep space between us."), 129 ("When he came over there and grabbed me, that is when I felt him on me. That is when I felt his penis on my back rear area, when he came over and grabbed me."), 130 (same).

[5] Tr. 62-63 ("I kept yelling, and still at that time nobody came."), 65 ("Q. How many times did you call out for Mays to assist you. A. [Rudd] Several times. Q. Did Mays or Braswell ever come to your aid? A. No, sir."), 288 (another Deputy in the room heard Rudd tell Burton to stop "several times"), 290 ("Q. Officer, did you or Officer Mays ever approach

(Continued on following page)

Burton dismissed petitioner's efforts to resist, admonishing her "Oh, you think you can take this old man, don't you."[6] Burton persisted, and began to remove petitioner's equipment from her person, tossing her handcuffs, baton and a magazine of ammunition onto the floor outside her cubicle.[7] Burton attempted to seize petitioner's handgun, but she fought him off.[8]

After this struggle had persisted for some time, Burton forcibly handcuffed petitioner to a filing cabinet.[9] The district court correctly noted that that action constituted an assault and battery. (App. 11a). At this point Burton himself urged his fellow officers to come closer to observe petitioner's plight,[10] and several did so.[11] Petitioner was only released when a female officer finally unlocked the handcuffs. With that one exception, none of the officers who observed this harassment took any action to protect

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Burton and ask him to quit doing what he was doing. A. [Officer Braswell] No, sir, we did not.").

[6] Tr. 61-62.

[7] Tr. 61-63.

[8] Tr. 64 ("it seemed like he was trying to get my gun belt, or my gun. But I kept trying to protect my gun.").

[9] Tr. 64-65 ("He got my hand close to him and twisted it all the way around to the back. And then at that time is when he handcuffed [me] to this filing cabinet.").

[10] Tr. 64 (Burton called out, "Oh, yeah, you can come look at her now. She ain't tough after all. I got her shit out in the floor and she ain't tough, come look at what I did to her.").

[11] Tr. 65 ("then, my co-workers came to look to see what he had done. . . . Officer Brasswell and Officer David Mays, both came."), 65 ("Q. Did [Mays and Brasswell] ever see you handcuffed to the filing cabinet. A. [Rudd] Yes, sir, they both did.").

petitioner from the assault or even told Burton to stop.[12] After the handcuffs were unlocked, petitioner gathered her equipment and took refuge in a restroom.

When she emerged from the restroom, petitioner spoke on the telephone with one of her supervisors, Sergeant Richard Nelson; while they were on the phone, another supervisor, Lieutenant Alvin Moore, came into the office. Petitioner proceeded to describe to Lieutenant Moore and Sergeant Nelson (who soon came to the office) what had occurred, including telling them that Burton "handcuffed me to a filing cabinet and he was rubbing himself on me."[13] Lieutenant Moore and Sergeant Nelson did not ask petitioner for details, did not ask Burton whether these allegations were true, and did not question any of the Sheriff's Deputies who had been present when the harassment occurred.[14] Neither supervisor conducted an investigation of any kind, filed any report regarding petitioner's complaint, or made any effort to separate petitioner from Burton.[15]

Although Burton was present at the time petitioner described the abuses to Lieutenant Moore, Moore said nothing to Burton.[16] Lieutenant Moore testified that

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[12] During the handcuffing incident, one Deputy Sheriff commented to Rudd and Burton, "Well, I don't see nothing and I don't hear nothing." (Tr. 65). Sergeant Nelson and Lieutenant Moore, Rudd's supervisors, both testified that any Deputy Sheriff who saw Rudd handcuffed to the filing cabinet should have come to her assistance. (Tr. 237-38, 348).

[13] Tr. 69-70; *see* Tr. 80, 207.

[14] Tr. 71, 75, 269, 291-92, 313-14, 345-47.

[15] Tr. 71, 74, 314, 346-48.

[16] Tr. 69:

(Continued on following page)

subsequently, as he was leaving the office for the night, he told Burton vaguely to "stop messing with my people."[17] Petitioner recalled Lieutenant Moore's remarks differently, testifying that Moore instead only instructed Sergeant Nelson – in terms that "didn't sound serious" – to say something to Burton.[18] No witness testified that Sergeant Nelson himself ever issued any such admonition to Burton. Burton certainly acted as if he had not been admonished in any way, proclaiming after Lieutenant Moore departed, "Oh, the Lieutenant is gone now and now its really on."[19]

Despite petitioner's complaint to Lieutenant Moore and Sergeant Nelson, the harassment continued unabated, much of it in the actual presence of one or both of the supervisors. Burton placed a "belly chain" around petitioner, who pushed the chain off.[20] Sergeant Nelson saw the incident, and Lieutenant Moore either saw or heard it, but neither supervisor said or did anything;[21] several other Deputies laughed at petitioner's predicament.[22] Burton went on the office loudspeaker and taunted petitioner, "So,

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Well, I was waiting for Lieutenant Moore to – you know, to say anything like, you know, "Let's have a report, or did this really happen." He said nothing. And then a few minutes later he said, "The only thing I can say is that you've represented the Fugitive Transportation Division the best you could."

[17] Tr. 344, 360.

[18] Tr. 73.

[19] Tr. 74.

[20] Tr. 233-34, 320. A belly chain is a steel restraining device used "to stop the prisoner's movements once they are cuffed." Tr. 311.

[21] Tr. 310, 320, 343, 357-58, 369.

[22] Tr. 311.

is it too hot in the kitchen, baby,"[23] a taunt that would have been audible to Sergeant Nelson.[24] Burton disassembled petitioner's police radio,[25] an incident of which Sergeant Nelson was also aware. Abandoned by both her supervisors and the other law enforcement officers in the office, petitioner finally left the office.

The Sixth Circuit correctly summarized the response of Lieutenant Moore and Sergeant Nelson to these protracted abuses: "Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22." (App. 4a).

Lieutenant Moore justified his inaction by insisting that petitioner had never told him about the physical struggle or handcuffing,[26] directly disputing petitioner's testimony to the contrary. Lieutenant Moore further insisted that petitioner was actually "smiling" and "laughing"[27] when she described Burton's actions. Sergeant Nelson only denied having been told about the handcuffing, not about the rest of Burton's actions,[28] and (unlike Lieutenant Moore) acknowledged that petitioner was upset.[29] Sergeant Nelson explained that at the time he had improperly dismissed Burton's actions as mere "horseplay,"[30] and acknowledged that he had erred in not taking

[23] Tr. 74.

[24] Tr. 75.

[25] Burton subsequently reassembled the radio.

[26] Tr. 341, 344.

[27] Tr. 359.

[28] Tr. 319, 323.

[29] Tr. 312.

[30] Tr. 316, 318, 325.

preventative measures.[31] The conflicting testimony regarding what petitioner had told Lieutenant Moore and Sergeant Nelson, and whether Moore had ever said anything at all to Burton, were issues presented to and resolved by the jury.[32]

On December 23 petitioner returned to work, and complained to a third supervisor. The response was different than what had occurred on December 22. The supervisor to whom petitioner spoke on December 23 referred the matter to the Internal Affairs Bureau, which five days later opened an investigation. Within a month, the Department reprimanded both Sergeant Nelson and Lieutenant Moore for having failed to assist petitioner. Thereafter, the Department notified Burton that he would be demoted to the rank of Patrolman, suspended for thirty

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[31] Tr. 317:

> Q. [Counsel for defendant]. All right. You should have intervened, correct?
>
> A. Yes, sir.

[32] In his closing argument, counsel for the County urged, for example:

> Lt. Moore testified that he did not know that night, that [Rudd] did not tell him that she had been handcuffed. Sgt. Nelson says that he did not know on the night of December the 22nd that she had been handcuffed. [Counsel for plaintiff] says it is inconceivable that they didn't know. . . . Well, they both testified. You decide who is telling the truth. I submit that she may have thought that she told him. She may have been telling them and Burton interrupted. They did not hear her. They testified truthfully.

Tr. 768.

Following the jury verdict for plaintiff, counsel for the county properly acknowledged in the Sixth Circuit that "[f]or the purpose of this appeal, Rudd's testimony must be taken as true." Brief for Appellants, *Rudd v. Shelby County, Tennessee*, No. 04-5939 (6th Cir.), 13.

days without pay, and placed on probation for six months. Burton appealed that discipline, and the Department ultimately agreed to permit Burton to retire at full rank and pay.[33]

The events of December 22, 2000, caused petitioner serious psychological trauma. She began psychiatric care in January, 2001, and in early January 2001 went on sick leave, never returning to her job at the Shelby County Sheriff's Department. From January 2001 until August 2002 the County paid petitioner on-the-job injury benefits. In October, 2002 the Shelby County Retirement Board awarded petitioner a line-of-duty disability pension. That pension is substantially lower than the wages that petitioner was earning when she worked for the Sheriff's Department.

Petitioner commenced this action against Shelby County alleging, *inter alia*, that the events in question constituted sexual harassment and gender discrimination in violation of Title VII. Petitioner's contention that the County was responsible for that harassment and discrimination rested in particular on the refusal of Sergeant Nelson and Lieutenant Moore and other Deputy Sheriffs to take action to assist petitioner during the events of December 22.[34] The County unsuccessfully moved for summary judgment on the issue of whether it was legally liable for the harassment that occurred on that date.[35] A

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[33] The intervening suspension and demotion cost Burton $4,987.56.

[34] Tr. 727-33.

[35] In denying that motion, the district court explained:

> The County maintains that, when Rudd complained about Burton's actions on the following day to Sergeant Roberson,

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jury found that petitioner had been harassed because of her gender, that the harassment unreasonably interfered with her work performance and created a hostile environment, and that Shelby County was responsible for failing to prevent or end that harassment. The jury awarded petitioner $9,112 in backpay, $306,208 in front pay, and $635,000 in compensatory damages.

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the County immediately initiated an internal affairs investigation which resulted in Burton's being disciplined.

Rudd does not dispute these contentions (although she notes that Burton's demotion was only temporary and that he was permitted to retire at the rank and with the pension of a Sergeant). She asserts, however, that despite the County's corrective action in the period after December 22, 2000, the County is liable because it failed to take corrective action promptly when it reasonably should have known that she was being harassed. First, she alleged that the incident on December 22, 2000, could not have and did not go unnoticed. She avers that Burton was calling out in an attempt to gather an audience. Further, Rudd claims that she was calling out to a fellow officer, David Mays, by name in an attempt to get assistance. That she was calling out is supported by the fact that she was only freed from the handcuffs when Officer Brinda Beard heard what was occurring and assisted Rudd by removing the handcuffs. Rudd alleges further that Sgt. Nelson witnessed the belly chain incident and took no action. . . .

The court concludes that genuine issues of material fact remain about whether the county took prompt corrective action when it reasonably should have been aware that the alleged behavior was occurring. The sex-based character of the incident could have been inferred from the belly chain incident. There is evidence that a number of officers, including Sgt. Nelson, a superior officer, were aware of what was occurring and did not intervene.

Order Granting in Part and Denying in Part The Motion for Summary Judgment of Defendants Shelby County and Sheriff A.C. Gilless, pp. 10-11.

The defendant moved for judgment as a matter of law.[36] It argued, *inter alia*, that it could not be held liable for the abuses that occurred on December 22 because in the days and weeks *after* the harassment the County's Internal Affairs Bureau (IAB) had investigated the incident and imposed disciplinary measures on Burton, Lieutenant Moore and Sergeant Nelson.

The district court rejected the County's argument, emphasizing that petitioner's claim had been based on the failure of County officials to take action on December 22 itself, while the campaign of harassment was still going on.

> Focusing on the IAB investigation would ignore the response that Rudd contends was not prompt

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[36] The County also moved for judgment as a matter of law during the trial. In denying that motion, the district court held there was sufficient evidence in the record to prove that on December 22 Lieutenant Moore and Sergeant Nelson were aware of the ongoing sexual harassment and failed to take action to end that abuse.

> I believe there is sufficient evidence in this case for a jury to conclude that management was aware of what was going on. And the testimony in this case is also that while Lieutenant Moore and Sergeant Nelson were present on the scene, Sergeant Burton . . . draped those belly chains around her. Lieutenant Moore heard it, knew that it happened. And it was even subsequent to that that Sergeant Burton went on the intercom.
>
> So I believe there is sufficient evidence here for a jury to find that these two individuals who were her supervisors . . . who were in the management capacity of the Sheriff's Department were aware of the ongoing sexual harassment, and that the jury should conclude it was sexual harassment. . . . The jury could then conclude that management – members of the management of the Sheriff's Department witnessed it and failed to stop it.

Tr. 673-74.

> and adequate. After being sexually harassed and physically assaulted by Burton, Rudd complained to Moore and Nelson. There is ample basis for the jury's conclusion that she complained and that Moore and Nelson's response was inadequate. Moore later told Rudd he considered the incident a "joke". . . . Burton continued harassing Rudd for several hours after supervisors became aware of the situation. The jury could reasonably have concluded that Nelson knew, or should have known, about this harassment after Burton used the public address system to mock Rudd. When a victim of sexual harassment complains, the response cannot be "prompt and adequate" where the harasser is openly allowed to continue his harassment and announces to the entire department that the harassment is continuing.

(App. 15a).

On appeal the Sixth Circuit concluded that petitioner "clearly satisfied" most of the elements of a Title VII sexually harassment claim. The court of appeals held that Burton's conduct was "shocking," and that there was ample evidence that petitioner "was subject to unwelcome sexual harassment," that "the harassment was based on [Rudd's] sex," and that "the harassment unreasonably interfered with her work performance and created a hostile work environment." (App. 3a).

The Sixth Circuit nonetheless overturned the jury verdict, holding as a matter of law that Shelby County was not legally responsible for the proven sexual harassment. In doing so the court of appeals applied "the test set forth in *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997)." (App. 1a). Under the Sixth Circuit's longstanding rule in *Blankenship*, an employer is not

liable for co-worker harassment merely because it was negligent in failing to prevent or correct that harassment. Rather, *Blankenship* establishes and the Sixth Circuit applies a far more demanding standard – the victim of co-worker harassment must prove that the employer failed to act in "good faith" in dealing with that harassment. 123 F.3d at 873.

The court below explained that "[u]nder the *Blankenship* standard. . . . [i]f the employer responds in good faith, it cannot be held liable." (App. 3a). The Sixth Circuit accepted petitioner's evidence regarding the events of December 22, and the failure of Lieutenant Moore and Sergeant Nelson to stop the protracted abuse which they knew was occurring in the office. "Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22." (App. 4a).

The court of appeals held nonetheless that "the county's actions demonstrate a good faith effort to safeguard Rudd." (App. 4a). The Sixth Circuit's finding of good faith rested exclusively on the actions taken *after* December 22, by supervisors other than Lieutenant Moore and Sergeant Nelson. The court of appeals reasoned that the County had acted in good faith because a third supervisor, to whom petitioner complained on December 23,

> immediately referred Rudd to the Internal Affairs Division, and, within five days after the incident, the department commenced a formal investigation. Rudd was permitted to work in a separate facility so that she would not have to encounter Burton. Within a month, the department issued an oral reprimand to one of Rudd's immediate supervisors and a written reprimand to the other. Approximately one week later, the

> department gave Burton written notice that he would be demoted to the rank of patrolman, suspended for thirty days without pay and placed on probation for six months.[37]

(App. 2a).

Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition on March 23, 2006.

REASONS FOR GRANTING THE WRIT

THE COURTS OF APPEALS ARE DIVIDED REGARDING THE STANDARD OF LIABILITY FOR CO-WORKER HARASSMENT

This case presents an important question of law which this Court expressly reserved in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) – what is the standard under Title VII[38] governing employer liability for sexual or other harassment by a *co-worker*? This Court has repeatedly addressed the standard governing employer liability for harassment by a supervisor. *Suders*, 542 U.S. at 141-154; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998);

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[37] The court of appeals' opinion also sets forth this same litany of events, which that court regarded as the dispositive facts, at App. 4a.

[38] The same issue arises regarding co-worker harassment under other federal anti-discrimination statutes. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004) (42 U.S.C. § 1981); *Weigold v. ABC Appliance Co.*, 105 Fed. Appx. 702 (6th Cir. 2004) (Family and Medical Leave Act); *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (Americans with Disabilities Act). The lower courts have assumed that the standard for employer liability under these statutes is the same as under Title VII.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). But this Court's opinions have deliberately left unresolved the liability standard for co-worker harassment. "*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we." *Suders*, 542 U.S. at 143 n.2.[39]

In the absence of guidance from this Court, the lower courts have reached sharply divergent conclusions regarding this issue. The Sixth Circuit holds that an employer is not liable for co-worker harassment unless the employer's response to that harassment was so exceptionally callous that it demonstrated a lack of "good faith." That circuit for almost a decade has repeatedly insisted that a mere showing of negligence is insufficient to establish employer liability. A majority of the courts of appeals hold, to the contrary, that employers are indeed liable if they are negligent in dealing with co-worker harassment. The legal standard governing *employer* liability under Title VII is of overarching importance because the harassers themselves are not subject to liability under Title VII.[40]

The instant case exemplifies the striking difference between the Sixth Circuit's indulgent "good faith" standard and the more demanding negligence standard applied in most circuits. Had this case arisen in one of the circuits that apply the negligence standard, the jury verdict for petitioner would assuredly have been upheld on

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[39] The court of appeals quoted this passage from *Suders* in holding that it was free to apply the *Blankenship* "good faith" standard to co-worker harassment cases. (App. 3a n.1).

[40] *E.g.*, *Dearth v. Collins*, 441 F.3d 931, 933-34 (11th Cir. 2006); *Wathen v. General Elec. Co.*, 115 F.3d 400, 406 (6th Cir. 1997); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994).

appeal. A jury certainly could find that it is negligence for two supervisors to fail to stop ongoing sexual harassment, including harassment occurring in their presence. The complete failure of Sergeant Nelson and Lieutenant Moore to make any effort to ascertain the truth of petitioner's complaint – their failure to question petitioner, Burton, or any of several eye-witnesses – is particularly compelling evidence of negligence.

In the Sixth Circuit, on the other hand, negligence on the part of the Sheriff's Deputies involved simply did not matter. Not only is the Sixth Circuit's "good faith" standard less demanding than the negligence standard, the Sixth Circuit assesses an employer's good faith over the entire period when the employer might have responded to the harassment, and weighs the actions of all the officials involved. Thus under the Sixth Circuit standard in the instant case, disciplinary measures imposed in February 2001 were sufficient to establish that Shelby County had overall acted in good faith, despite severe misconduct on December 22, 2000 by County supervisors and others who spurned petitioner's plea for protection from ongoing abuse. Under the Sixth Circuit standard – unlike the negligence standard – that misconduct could be outweighed by actions taken by other County officials in the weeks that followed.

I. IN THE SIXTH CIRCUIT EMPLOYER LIABILITY UNDER TITLE VII FOR CO-WORKER HARASSMENT REQUIRES PROOF THAT THE EMPLOYER DID NOT ACT IN GOOD FAITH; MERE NEGLIGENCE IS INSUFFICIENT

For more than a decade the Sixth Circuit has held that an employer is only liable for co-worker harassment if

the harassment victim can demonstrate that the employer failed to respond in "good faith" to a problem of harassment. The controlling precedent in that circuit is *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997). The panel below expressly applied "the test set forth in *Blankenship*." (App. 1a; *see id.* at 3a ("the elements set forth in *Blankenship*"), 3a ("[u]nder the *Blankenship* standard"), 3a ("Rudd has clearly satisfied the first four elements of the *Blankenship* test, but she has not satisfied the fifth"), 4a ("Rudd has not proven the fifth element of the *Blankenship* test."), 3a n.1 ("We apply *Blankenship* because this case deals with coworker harassment.")).

Blankenship emphatically rejected the rule accepted by most circuits that an employer may be held liable for co-worker harassment if the employer was negligent in responding to that harassment. "Once an employer is aware of and responds to charges of sexual harassment, . . . *mere negligence* as to the content of the response cannot be enough to make the employer liable." 123 F.3d at 873 (emphasis added).[41] Rather, in the Sixth Circuit the controlling standard is whether the employer acted in "good faith." "When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination." *Id.* Although the employer's actions in *Blankenship* itself had proven clearly inadequate to end the harassment,[42] the Sixth Circuit

[41] Under *Blankenship* the good faith of an employer's actions are measured against the facts it knew or should reasonably have known. 123 F.3d at 873.

[42] After Blankenship had been harassed for several weeks, she complained to her supervisors both orally and in writing. Company officials thereafter merely kept an eye on her; "[n]one of the administrators

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nonetheless held that there was insufficient "evidence to refute the employer's claims that its actions were in good faith." *Id.* The employer's "measures may not have been sufficient," the court explained, but "they . . . easily satisfy the 'good faith' standard." *Id.*

When the Sixth Circuit adopted the good faith standard in *Blankenship*, that circuit knowingly and deliberately rejected the negligence standard that has been adopted by most other circuits. Judge Merritt pointed out in a dissenting opinion in *Blankenship* that other courts of appeals applied the very negligence standard which the Sixth Circuit rejected.

> Several courts have applied . . . agency principles, as directed by the Supreme Court, in coemployee cases. . . . Courts have cited the Restatement (Second) of Agency § 219(2)(b) for the familiar proposition that a master may be subject to liability for the torts of his servant, even if the servant is acting outside the scope of his or her employment, if "the master was negligent or reckless." *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990). . . . This theory of employer liability has been ratified many times over. "[I]t is clear, the criterion for when an employer is liable for sexual harassment is *negligence*. . . ." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995).

123 F.3d at 876 (Merritt, J., dissenting).

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confronted [the harasser] in any way." 123 F.3d at 871. A week after this first fruitless complaint, the harasser grabbed Blankenship's breasts and asked her out. When Blankenship and then another worker complained again, the employer still refused to discipline the harasser, and instead merely issued a written warning. When the harassment continued, Blankenship resigned. *Id.*

Blankenship remains entrenched law in the Sixth Circuit. Since the controlling Sixth Circuit decision in *Blankenship*, decisions in that circuit have repeatedly reaffirmed its core holding that an employer is not liable for co-worker harassment merely because it responded negligently to complaints about that abuse. "In determining whether a response was 'prompt and appropriate,' negligence in fashioning a remedy is not sufficient for the employer to incur liability." *Nievaard v. City of Ann Arbor*, 124 Fed. Appx. 948, 954 (6th Cir. 2005).[43] Thus in *Greenwood v. Delphi Automotive System, Inc.*, 103 Fed. Appx. 609 (6th Cir. 2004), the employer for three months had failed to take effective action to end the harassment about which the plaintiff had complained; the Sixth Circuit upheld summary judgment in favor of the employer, reasoning that the plaintiff's evidence "portray[s] at most mere 'negligence in the fashioning of a remedy.'" 103 Fed. Appx. at 612 (emphasis omitted). In *Southerland v. Sycamore Community School District Bd. of Education*, 125 Fed. Appx. 14, 19 (6th Cir. 2004), the Sixth Circuit held that it would be improper to instruct a jury that it could

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[43] *Greenwood v. Delphi Automotive System, Inc.*, 103 Fed. Appx. 609, 612 (6th Cir. 2004) (plaintiff's evidence insufficient because it proved no more than negligence); *Weigold v. ABC Appliance Co.*, 105 Fed. Appx. 702, 710 (6th Cir. 2002) ("mere negligence as to the content of the response cannot be enough to make the employer liable.") (*quoting Blankenship*); *Gwen v. Regional Transit Auth.*, 7 Fed. Appx. 496, 502 (6th Cir. 2001) (*quoting Blankenship*); *Boykin v. Michigan Dept. of Corrections*, 2000 WL 491512, *7 (6th Cir.) (*quoting Blankenship*); *Summerville v. Ross/Abbott Laboratories*, 1999 WL 623786, *7 (6th Cir.) (*quoting Blankenship*); *Birone v. Indian River School*, 1998 WL 199791, *3 (6th Cir.) (*quoting Blankenship*).

impose liability on an employer for co-worker harassment based on a showing of mere negligence."

Since the decision in *Blankenship*, panels in the Sixth Circuit have repeatedly applied the rule that to avoid liability for co-worker harassment "[a]ll that is required is 'good-faith.'" *Greenwood*, 103 Fed. Appx. at 612. *E.g., Nievaard v. City of Ann Arbor*, 124 Fed. Appx. 948, 955 (6th Cir. 2005) (summary judgment appropriate because plaintiff failed to show that employer's conduct "was not undertaken in good faith"); *Weigold v. ABC Appliance Co.*, 105 Fed. Appx. 702, 710 (6th Cir. 2002) ("When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination.") (*quoting Blankenship*); *Gwen v. Regional Transit Authority*, 7 Fed. Appx. 496, 502 (6th Cir. 2001) (" 'When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination.' . . . [T]he question we are faced with is . . . whether the [employer] failed to act in good faith. . . . [T]here simply is no evidence that the [employer] failed to act in good faith."); *Summerville v. Ross/Abbott Laboratories*, 1999 WL 623786, *7 (6th Cir.) (*quoting Blankenship*); *Birone v. Indian River School*, 1998 WL 199791, *3 (6th Cir.) ("Birone's supervisors did respond to her complaints . . . in ways that suffice to meet the *Blankenship* good-faith standard.").

The decision of the court of appeals in the instant case was a straightforward application of this entrenched Sixth Circuit standard.

" 125 Fed. Appx. at 19 (" 'mere negligence as to the content of the response cannot be enough to make the employer liable.' *Blankenship*. . . . The instruction . . . does not permit liability for mere negligence in an employer's response.").

II. A MAJORITY OF THE COURTS OF APPEALS HOLD THAT AN EMPLOYER IS LIABLE UNDER TITLE VII FOR CO-WORKER HARASSMENT IF THE EMPLOYER WAS NEGLIGENT IN FAILING TO PREVENT OR CORRECT THAT HARASSMENT

Most circuits, unlike the Sixth, hold that an employer is liable under Title VII if the employer was negligent in responding to complaints or information regarding sexual or other invidious harassment. In a majority of the courts of appeals, an employer which engaged in good faith but negligent conduct in dealing with co-worker harassment is held to have violated Title VII.

Outside the Sixth Circuit, negligence is the reigning standard in co-worker harassment cases. For example, the Third Circuit recently applied the negligence standard to a co-worker harassment case.

> When coworkers are the perpetrators, the plaintiff must prove employer liability using traditional agency principles. . . . Typically, the plaintiff in a coworker harassment case argues for direct employer liability on a theory of "negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment." *See Bouton* [*v. BMW of N. Am. Inc.*], 29 F.3d [103,] 106 [(3d Cir. 1994)] (citing *Restatement (Second) of Agency* § 219(2)(b)).

Jensen v. Potter, 435 F.3d 444, 452-53 (3d Cir. 2006) (opinion by Alito, J.); *see id.* (finding employee's evidence sufficient "to establish employer negligence.").

In his dissenting opinion in *Blankenship*, Judge Merritt noted that the good faith standard adopted by the Sixth Circuit in that case for co-worker harassment cases conflicted with the negligence standard utilized in such cases by

the Seventh Circuit. 123 F.3d at 876. In the years since the Sixth Circuit in *Blankenship* rejected the negligence standard, the Seventh Circuit has consistently and repeatedly applied that negligence standard.[45] Judge Merritt also noted

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[45] *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005) ("employers are liable for a coworker's harassment only 'when they have been negligent . . . in . . . remedying the harassment' ") (*quoting Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997)); *Venezia v. Gottlieb Memorial Hospital, Inc.*, 421 F.3d 468, 472 (7th Cir. 2005) (employer is "liable for the actions of [the victim's] coworkers if it negligently failed to . . . remedy them."); *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004) (plaintiff "must show that his employer has 'been negligent . . . in . . . remedying the harassment.' "); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 478 (7th Cir. 2004) (plaintiff may establish liability by proving that the employer "was negligent in . . . rectifying the racial harassment any other employee or employees directed at him."); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004) (plaintiff must "demonstrate [the employer] was negligent."); *Longstreet v. Illinois Dep't of Corrections*, 276 F.3d 379, 381 (7th Cir. 2002) (in a co-worker sexual harassment case an employer is liable "if it negligently failed to take steps to remedy the illegal harassment."); *Logan v. Kautex Textron North America*, 259 F.3d 635, 641 (7th Cir. 2001) ("in co-worker harassment cases, the plaintiff must show that the employer was negligent in failing to correct the harassment."); *Haugerud v. Amery School Dist.*, 259 F.3d 678, 696-97 (7th Cir. 2001) (employer liable for harassment by co-worker if "it negligently failed to take reasonable steps to . . . remedy the harassment."); *Mason v. Southern Ill. Univ. at Carbondale*, 233 F.3d 1036, 1043 (7th Cir. 2000) ("[t]he employer is liable for a hostile work environment created by the employee's coworkers . . . only when the employee shows that his employer has 'been negligent . . . in . . . remedying the harassment.' "); *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999) ("a plaintiff must show negligence in order to hold an employer liable for co-worker harassment"); *Wilson v. Chrysler Corp.*, 172 F.3d 500, 508 (7th Cir. 1999) ("[l]iability for co-worker harassment requires a showing of negligence on the part of the employer."); *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (employee can establish employer liability by proving that the employer "was negligent in preventing or remedying the harassment."); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir. 1999) (liability of employer turns on whether it "was negligent in responding to the harassment"); *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998) ("plaintiff must show negligence in order to hold an employer liable for co-worker

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in his dissent that the Tenth Circuit had adopted the negligence standard for co-worker harassment cases. 123 F.3d at 876. That remains the position of the Tenth Circuit.[46]

The negligence standard for determining employer liability for co-worker harassment has also been adopted by the First,[47] Second,[48] Fourth,[49] Fifth,[50] Ninth,[51] and

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harassment"); *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998) ("employers are liable for co-employee's harassment only when they have been negligent . . . in . . . remedying the harassment.").

[46] *Rennard v. Woodworker's Supply, Inc.*, 101 Fed. Appx. 296, 304 (10th Cir. 2004) (employer liable for co-worker harassment "where the employer was negligent"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998) (employer liable for co-worker harassment if it was negligent; plaintiff could prevail by demonstrating the employer's "negligence in allowing fellow employees to engage in sexual harassment.").

[47] *Noviello v. City of Boston*, 398 F.3d 76, 95 (1st Cir. 2005) ("When coworkers, rather than supervisors, are responsible for the creation and perpetuation of a hostile work environment, . . . several federal courts, including this court, have held that . . . an employer can only be liable if the harassment is causally connected to some negligence on the employer's part.").

[48] *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 441 (2d Cir. 1999) ("if the harasser is the victim's co-worker, the employer will be liable only if it is negligent.").

[49] *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325, 334-35 (4th Cir. 2003) ("noting that '[n]egligence sets a minimum standard for employer liability under Title VII' "; "[t]he jury properly imputed coworker harassment to [the employer] under the negligence . . . theory.").

[50] *Derouen v. Carquest Auto Parts, Inc.*, 2001 WL 1223628, *1 n.9 (5th Cir.) ("the negligence standard . . . governs liability for co-worker harassment"); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) ("[g]enerally, the negligence standard governs employer liability for *co-worker* harassment."); *Williamson v. City of Houston, Texas*, 148 F.3d 462, 465 (5th Cir. 1998) ("[a]s a number of courts have pointed out, employer liability for harassment by co-workers is direct liability for negligently allowing harassment.").

[51] *Swenson v. Potter*, 271 F.3d 1184, 1191 ("[n]egligence . . . exposes the employer . . . to liability for . . . the harm that the employer inflicted

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District of Columbia[52] Circuits. The New Hampshire Supreme Court, which construes that state's anti-discrimination laws in conformity with Title VII, has chosen to follow decisions in the Seventh and Ninth Circuits adopting a negligence standard for co-worker harassment cases,[53] and has rejected the Sixth Circuit interpretation of Title VII in *Blankenship* as inconsistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).[54]

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on the plaintiff as a result of its inappropriate response"), 1196 ("the employer cannot be held liable unless it reacts negligently to the harassment complaint.") (9th Cir. 2001); *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001) ("[i]f . . . the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent"); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) ("[w]hen harassment by co-workers is at issue, the employer's conduct is reviewed for negligence.").

[52] *Curry v. District of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999) ("a negligence standard governs employer liability for a co-worker's harassment.").

[53] *Madeja v. MPB Corp.*, 149 N.H. 371, 378, 821 A.2d 1034, 1043 (2003):

> [W]e rely upon cases developed under Title VII to aid in our analysis. . . . The employer is directly liable for its own negligence because its negligence caused the harassment. . . . the negligence standard of liability extends to both the employer's failure to discover and its failure to remedy co-worker sexual harassment. *See Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998) . . . *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001).

[54] 149 N.H. at 378, 821 A.2d at 1042-43:

> The defendant asserts that mere negligence is insufficient. *See Blankenship v. Parke Care Centers, Inc.* . . . . We believe that the defendant mistakenly relies upon *Blankenship*. Recent United States Supreme Court cases have abrogated its holding regarding employer liability for co-worker sexual

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III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT

This entrenched and intractable conflict regarding the standard of liability for co-worker harassment is a matter of considerable importance. Co-worker harassment, particularly co-worker sexual harassment, is a serious problem, and has given rise to a substantial volume of litigation. Because this Court's decision in *Faragher* and *Ellerth* holds employers to a high standard of care when harassment is engaged in by supervisors, employers which may not have met the *Faragher* and *Ellerth* standard frequently litigate whether a harassing official was in fact a supervisor of the victim.[55] If the harasser (as here) was not the victim's own immediate or higher level supervisor, the co-worker liability standard – whatever it may be – applies.

The Sixth Circuit's "good faith" standard is at odds with this Court's reasoning in *Faragher* that "[i]t would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to *prevent* violations." 524

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harassment. In *Burlington Industries, Inc. v. Ellerth* . . . and *Faragher v. Boca Raton*, . . . cases decided after *Blankenship*, the United States Supreme Court clarified that employer liability for co-worker sexual harassment may be predicated upon its negligence with respect to both the discovery of and remedy for co-worker sexual harassment.

[55] That is precisely what occurred in the instant case. The district court declined to apply the liability standard for supervisor harassment established by *Faragher* and *Ellerth* because Sergeant Burton had not "exercised actual supervisory authority" over Rudd. Order Granting in Part and Denying in Part The Motion for Summary Judgment of Defendants Shelby County and Sheriff A.C. Gilless, pp. 7-8 n.3.

U.S. at 806 (emphasis added). The point at which County officials could have prevented sexual harassment was on December 22, 2000, when a number of Sheriff's Deputies – including several supervisors – did little or nothing about the harassment that they well knew was going on. The County's obligation to prevent sexual harassment was not satisfied merely because later the next year – when petitioner was no longer working in the Sheriff's office – other (and in some instances higher ranking) County officials decided to punish the harasser.

The Sixth Circuit standard is inconsistent as well with this Court's repeated holding that employer liability for sexual harassment is governed by agency principles. *Faragher*, 524 U.S. at 791-803; *Ellerth*, 524 U.S. at 755-63; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70-72 (1986). Under the Restatement (Second) of Agency (1957), an employer is liable if the employer (or its agent) was negligent in failing to prevent misconduct by persons (such as Burton) on the employer's premises or under the employer's control. Where an employer's agent is negligent, the employer is legally responsible under agency principles, even if other (possibly higher ranking) agents earnestly disapproved or took actions after-the-fact to correct the misconduct that resulted. If Sheriff's Deputies had been negligent in permitting a drunkard to drive a squad car, Shelby County would have been liable for any resulting accident, regardless of whether those Deputies or the drunk driver were subsequently punished. The negligence of those Deputies in permitting the sexual harassment of petitioner is no different. The negligence standard in agency law is the very standard rejected by the Sixth Circuit, but accepted by most other courts of appeals. Certiorari should be granted to resolve this conflict as to

the legal standard applicable to co-worker harassment cases.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgement and opinion of the Sixth Circuit.

Respectfully submitted,

LES JONES
DAVID E. GOODMAN, JR.
BURCH, PORTER AND JOHNSON
130 North Court Avenue
Memphis, TN 38103
(901) 524-5000

ERIC SCHNAPPER*
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 04-5939

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LATANUA RUDD,	)
Plaintiff-Appellee,	) **ON APPEAL FROM**
	) **THE UNITED STATES**
v.	) **DISTRICT COURT**
SHELBY COUNTY, TENNESSEE,	) **FOR THE WESTERN**
	) **DISTRICT OF**
	) **TENNESSEE**
Defendants-Appellants.	)

(Filed Jan. 5, 2006)

BEFORE: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Shelby County, Tennessee, appeals the district court's denial of its motion for judgment as a matter of law in this sexual harassment case. Because we find as a matter of law that Shelby County took prompt and corrective action for purposes of the test set forth in *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), we reverse the decision of the district court.

Latanua Rudd, the plaintiff and appellee in this case, was a deputy sheriff in the Shelby County Sheriff's Department. She was sexually harassed by her co-worker, Sergeant Lance Burton. In a single afternoon, Burton handcuffed Rudd, bending over, to a file cabinet, rubbed himself on her, draped a belly chain around her neck and

asked via intercom whether it was "too hot in the kitchen" for her. Although the parties' accounts vary as to the actions taken by Rudd's immediate supervisors on the day of the harassment, it is clear that, on the following day, Rudd complained to a superior officer. That officer immediately referred Rudd to the Internal Affairs Division, and, within five days after the incident, the department commenced a formal investigation. Rudd was permitted to work in a separate facility so that she would not have to encounter Burton. Within a month, the department issued an oral reprimand to one of Rudd's immediate supervisors and a written reprimand to the other. Approximately one week later, the department gave Burton written notice that he would be demoted to the rank of patrolman, suspended for thirty days without pay and placed on probation for six months. He appealed the penalty, and while his appeal was pending, he retired with full rank and pay pursuant to a settlement agreement with the department. Rudd, who left her job within two weeks of the harassment, filed this action, claiming, among other things, that the conduct of her co-worker Burton constituted sexual harassment and gender discrimination and created a hostile work environment in violation of 42 U.S.C. § 2000e ("Title VII") and the Tennessee Human Rights Act. A jury awarded her almost $1 million in compensatory damages, back pay and lost future wages.

After the district court refused to grant judgment as a matter of law pursuant to Fed. R. Civ. p. 50(b), Shelby County filed this appeal. We review *de novo* a district court's denial of judgment as a matter of law. *McMurdy v. Montgomery County, Ohio,* 240 F.3d 512, 517 (6th Cir. 2001).

The outcome of this case depends not on the egregiousness of Burton's behavior but on whether Rudd has proven the elements set forth in *Blankenship*.[1] 123 F.3d at 872. In order to prevail in a coworker harassment case under *Blankenship*, an employee must prove that (1) the employee is a member of a protected class; (2) the employee was subject to unwelcomed sexual harassment; (3) the harassment was based on the employee's sex; (4) the harassment unreasonably interfered with her work performance and created a hostile work environment; and (5) the employer knew or should have known of the charged sexual harassment and failed to implement prompt and corrective action. *Id.* This standard is "markedly different" from the one applied to harassment by supervisors. *Id.* at 873. Under the *Blankenship* standard, "the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." *Id.* If the employer responds in good faith, it cannot be held liable. *Id.* Finally, "the appropriateness of a response depends on the frequency and severity of the alleged harassment." *Id.* at 872.

Rudd has clearly satisfied the first four elements of the *Blankenship* test, but she has not satisfied the fifth. Officer Burton's conduct – shocking as it was – does not

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[1] We apply *Blankenship* because this case deals with coworker harassment. Although Shelby County invites us to look to the Supreme Court's decision in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), we decline to do so. *Suders* dealt with applicability of the *Ellerth/Faragher* defense to cases where a hostile work environment was created by a supervisor. *Id.* at 143. Burton was not Rudd's supervisor: he was her coworker. The Court wrote in *Suders*, "*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we." *Id.* n.6. Accordingly, *Blankenship* applies.

relieve Rudd of the burden of proving that Shelby County failed to take prompt and effective corrective action once it learned of Burton's harassment. *Blankenship,* 123 F.3d at 873. The evidence, viewed in the light most favorable to Rudd, does not permit such a finding. Rudd's immediate supervisors learned of Burton's harassment, and failed to take any corrective action, on December 22. On December 23, Rudd notified a superior officer, who referred her that very day to the Internal Affairs Division. The Internal Affairs Division asked her to file forthwith a detailed written report of the harassment, which she did. Contemporaneously, Rudd was permitted to begin working in a separate facility, away from Burton. By December 28, the Internal Affairs Division had begun its investigation. In a little over a month, the department had notified Burton of the discipline it intended to impose, and had actually disciplined Rudd's supervisors. Although Burton's early retirement was galling to Rudd, it removed him from the department, and, in any event, Rudd did not return to work at the department after January 6, 2001.

We find as a matter of law that the county's actions demonstrate a good faith effort to safeguard Rudd, and that no reasonable jury could have concluded that Shelby County failed to take prompt and corrective action. Because Rudd has not proven the fifth element of the *Blankenship* test, we **REVERSE** the district court's order denying judgment as a matter of law and **REMAND** the case for judgment in favor of Shelby County.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

LATANUA RUDD,	)	
Plaintiff,	)	
v.	)	**No. 01-3020 Ma/V**
SHELBY COUNTY, TENNESSEE,	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION TO INCORPORATE THE JURY'S FRONT PAY AWARD INTO FINAL JUDGMENT AND DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR FOR NEW TRIAL, OR FOR REMITTITUR, OR TO VACATE THE AWARD OF BACK PAY AND FRONT PAY

(Filed Jan. 26, 2004)

Before the court are two pending motions. The first is Plaintiff's October 17, 2003 motion to incorporate the jury's front pay award into final judgment. Defendant filed a short response on October 27, 2003, and referred the court to its own motion to vacate the award of front pay filed concurrently. The second is Defendant's October 27, 2003 renewed motion for judgment as a matter of law, or for new trial, or for remittitur, or to vacate the award of back pay and front pay. Plaintiff filed a response on November 6, 2003. For the following reasons, Plaintiff's motion is GRANTED and Defendant's motion is DENIED.

I. Background

A. Factual Background

The following evidence was adduced at trial. Plaintiff, Latanua Rudd, is a former commissioned deputy sheriff with the Shelby County Sheriff's Department. On the night of December 22, 2000, a co-worker, Sergeant Lance Burton, sexually harassed her and assaulted and battered her. The assault and battery occurred when Burton forcibly handcuffed Rudd to a filing cabinet in her cubicle. Burton also threw certain of Rudd's personal items from her cubicle and invited their co-workers to view Rudd handcuffed to the filing cabinet, No one came to Rudd's assistance during the incident, although a fellow officer later unhandcuffed her.

Later on the night of December 22, Rudd informed her immediate supervisors, Lieutenant Alvin Moore and Sergeant Richard Nelson, of what had occurred. Rudd asked Moore, before he left the office, to instruct Burton not to say anything to her or to put his hand on her. Moore responded by telling Burton to leave Rudd alone and by telling Nelson to take care of her. After Moore left the office, Burton told Rudd "now it's really on." Following the supervisors' notice of the handcuffing incident, three more incidents occurred that night. First, Burton used the public address system to announce to Rudd and others: "What's wrong, Tammy, is the heat too hot in the kitchen?" Second, Burton disassembled Rudd's radio, although he reassembled it after Rudd complained to Nelson and Nelson suggested leaving the radio on the chief's desk with an explanatory memo. Third, Burton confronted Rudd at the copying machine, and Rudd suggested they settle their differences outside. Nelson observed this

confrontation and drew his hand across his throat. Burton then apologized and left.

As a result on the incidents on December 22, 2000, Rudd became disabled and has been unable to return to work in law enforcement. The mental health professionals retained by the County have advised her that she will probably be unable to return to work in law enforcement. Competent testimony indicated that any other work for which Rudd is qualified would pay much less than her job with Shelby County.

B. Procedural Background

Beginning September 29, 2003, the court held a jury trial on Rudd's claims under the Tennessee Human Rights Act ("THRA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Tennessee Governmental Tort Liability Act ("TGTLA"). The jury was charged on October 6, 2003, and returned a verdict the same day, finding for Rudd on her THRA and Title VII claims, but finding for Shelby County on the TGTLA claim. Shelby County has submitted a brief with eight arguments about why it should be granted judgment as a matter of law or some alternative form of relief.

II. Standards

A. Renewed Judgment as a Matter of Law

Federal Rule of Civil Procedure 50 governs judgments as a matter of law. Judgment as a matter of law is appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). A motion for judgment as a

matter of law may be renewed "no later than 10 days after entry of judgment."[1] Fed. R. Civ. P. 50(b). The question is whether there is sufficient evidence to raise a question of fact for the jury. *Hicks v. Frey*, 992 F.2d 1450, 1456 (6th Cir. 1993). In deciding this issue, the court must view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in her favor. *See id.* "[T]he trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury." *Ratliff v. Wellington Exempted Village Schs. Bd. of Ed.*, 820 F.2d 792, 795 (6th Cir. 1987).

B. New Trial

Federal Rule of Civil Procedure 59(a)(1) provides for a new trial "in an action in which there has been a trial by jury, for any reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." "Generally courts have interpreted this language to mean that a new trial is warranted when a jury has reached a 'seriously erroneous result' as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion. . . ." *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). When the moving party contends that the jury's verdict was against the weight of the evidence, the trial court should:

> compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion

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[1] The renewed motion for judgment as a matter of law was formerly referred to as judgment notwithstanding the verdict ("JNOV").

> that the verdict is against the clear weight of the evidence. It should deny the motion if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable.

Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 541-42 (6th Cir. 1993). "A court may not substitute its judgment for that of the jury. . . ." *Holloway v. Wal-Mart Stores, Inc.*, 909 F. Supp. 534, 536 (E.D. Tenn. 1995). The court must accept any reasonable verdict. *Id.*

III. Analysis

The court will address each of Shelby County's arguments in turn.

A. Lance Burton's Speculative Answers to Hypothetical Questions Should Have Been Excluded

Defendant previously raised this issue in a motion *in limine*. The court denied that motion by order entered September 25, 2003. The court's view of the law has not changed, and this argument is not well-taken for the reasons stated in the September 25, 2003 order.

B. Inconsistent Verdicts

Defendant claims that the jury's verdicts holding Shelby County liable under the THRA and Title VII, but finding no liability under the TGTLA, are inconsistent. To find for Rudd on the THRA and Title VII claims, the jury

found that she had proven: (a) that Lance Burton harassed her because of her gender, (b) that supervisory employees knew or should have known of Burton's sexual harassment, and (c) that the supervisory employees failed to take prompt and appropriate corrective action. To find for Shelby County on the TGTLA claim, the jury found that Rudd had not proven that she was subject to offensive physical contact as the foreseeable consequence of Shelby County's failure to take reasonable precautions to protect her from the threat of such contact posed by Lance Burton. Defendant claims that, under the facts of this case, Shelby County was on notice as to the risk that Burton was likely to sexually harass someone *and* that he was likely to assault and batter someone, or it was on notice as to neither risk.

When confronted with "apparently conflicting jury findings, the court has a duty under the seventh amendment to harmonize the answers, if it is possible to do so under a fair reading of them." *Gosnell v. Sea-Land Serv. Inc.*, 782 F.2d 464, 466 (4th Cir. 1986). If the jury's verdicts can be read as "expressing a coherent and reasonable view of the case," the court should adopt that reading. *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1148 (6th Cir. 1996).

The verdicts in this case are reconcilable. The jury's finding for Shelby County under the TGTLA indicates that it did not consider the assault and battery by Burton upon Rudd foreseeable. The assault and battery claim in this case arose from Burton's handcuffing Rudd to a filing cabinet. The test is forseeability. There is evidence that, after this incident, Rudd reported what had happened to her supervisors Lt. Moore and Sgt. Nelson. The test is whether they knew or should have known of Burton's sexual harassment and taken corrective action. Even after

Moore and Nelson became aware of Burton's actions, they allowed continued contact between Burton and Rudd during the night. Burton continued to harass Rudd, although that harassment did not rise to the level of assault and battery. The jury could have based its determination that Shelby County was liable under the THRA and Title VII on the harassment which occurred after the assault and battery and after the assault and battery and earlier sexual harassment had been reported to Moore and Nelson. Interpreting the verdicts in this way, although it may not have been foreseeable that Burton would commit assault and battery, Moore and Nelson knew or should have known, after learning of the assault and battery and sexual harassment, that Burton might continue such behavior and should have taken corrective action. The jury's verdicts are not irreconcilable and can be read consistently with each another.

C. Burton's Conduct After the Handcuffing Incident Was Not Severe or Pervasive

Although Shelby County devotes a portion of its brief to the argument that the verdicts were inconsistent, it appears to realize that the verdicts can be reconciled as the court has done. The County argues, however, that if the court reconciles the verdicts in this way, the County should be granted judgment as a matter of law. According to the County, Burton's conduct after the handcuffing incident was not so severe or pervasive as to create an objectively sexually hostile work environment under the THRA or Title VII. Rudd contends that the jury could have properly looked to all of the events which occurred the night of December 22, 2000 in deciding whether she was forced to endure a hostile work environment.

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Relevant circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* The situation must be such that a reasonable person would consider it hostile or abusive. *Id.* at 21.

The court concludes that there was sufficient evidence to create an issue of fact for the jury on this issue, thus preventing the court from granting the renewed motion for judgment as a matter of law. Further, having compared the opposing proofs and weighed the evidence, the court finds that the jury could reasonably draw the conclusion it did. Therefore, the court is prevented from granting a new trial.

The question is whether Rudd was subjected to a hostile work environment. The County's liability for any such hostile work environment is determined separately. *See Fuller v. City of Oakland, California*, 47 F.3d 1522, 1528 (9th Cir. 1995) (considering all the incidents in determining whether a hostile work environment existed, then considering liability). Shelby County cites no case for the proposition that events which occur prior to notice cannot be considered in determining if a work environment is hostile.[2] Further, the events prior to notice may

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[2] The opposite is true. *See Fuller*, 47 F.3d at 1527-28 (considering events which occurred prior to notice in determining if a hostile work environment existed); *cf. Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002) (holding the district court erred by not considering discriminatory

(Continued on following page)

color the lens through which the post-notice activities are viewed by both the jury and the court. *See Kline v. City of Kansas City, Missouri*, 175 F.3d 660, 665 (8th Cir. 1999) (citing *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998) ("'instances of harassment occurring outside the [limitations] period may be admissible to provide relevant background to later discriminatory acts'"); *Ramsey*, 286 F.3d at 268 (stating that time-barred events are relevant background information). For instance, the phrase "What's wrong Tammy, is the heat too hot in the kitchen?" by itself would be a mere offensive utterance. However, given that a number of Rudd's co-worker's had seen her humiliated by Burton earlier that night, this question, broadcast over the public address system, could be viewed as humiliating. In addition, the three post-notice incidents that occurred the same night qualify as frequent. The fact that Burton's continued harassment of Rudd almost escalated into a second physical confrontation indicates that the harassment was physically threatening. Finally, Rudd became disabled as a result of the events that night. The harassment, therefore, unreasonably interfered with her work performance. There was a question of fact for the jury, and the jury's answer to that question was reasonable.

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incidents that occurred outside the filing period in determining if a hostile work environment existed).

D. Rudd's Statements to Her Supervisors Did Not Constitute Notice to Them of Sexual Harassment

The County claims that, in any event, it cannot be held liable for any of the events which occurred on December 22, 2000, because Rudd's statements to Moore and Nelson were insufficient to constitute notice of sexual harassment. Rudd testified that she informed Moore and Nelson of Burton's actions earlier that night, although she did not label it sexual harassment at the time. Whether or not this was sufficient notice to Shelby County of sexual harassment was a question of fact for the jury. Judgment as a matter of law is inappropriate because there was sufficient evidence that Rudd had provided notice to create an issue of material fact for the jury. The jury's finding that Rudd provided adequate notice of sexual harassment was reasonable and not against the weight of the evidence. The court will not disturb the jury's verdict.[3]

E. The IAB Investigation was Prompt and Adequate

The County next argues that the Internal Affairs Bureau ("IAB") investigation was prompt and adequate. Where an employer takes prompt corrective action, it cannot be held liable. *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 829-30 (6th Cir. 1999). Shelby County cites *Stevens v. U.S. Postal Serv.*, 21 Fed. Appx. 261, 264 (6th Cir. 2001) (unpublished), for the proposition that an employer can wait

[3] The County also argues that it did not have constructive notice through Rudd's coworkers. The court does not address this argument in light of its decision that adequate evidence supports the jury's implicit finding that Rudd's supervisors had actual notice.

three days before separating a harasser and his victim and that its actions will be considered prompt. The *Stevens* court, however, noted that such a delay was acceptable "under the circumstances." *Id.* Those circumstances included the fact that the alleged harasser's actions did not actually create a hostile work environment. *See id.*

Focusing on the IAB investigation would ignore the response that Rudd contends was not prompt and adequate. After being sexually harassed and physically assaulted by Burton, Rudd complained to Moore and Nelson. There is ample basis for the jury's conclusion that she complained and that Moore and Nelson's response was inadequate. Moore later told Rudd he considered the incident a "joke" and responded to it that night by telling Burton to leave Rudd alone. Burton did not in fact leave Rudd alone, and Burton indicated that Rudd's complaint would lead to an escalation in his level of harassment. Burton continued harassing Rudd for several hours after supervisors became aware of the situation. The jury could reasonably have concluded that Nelson knew, or should have known, about this harassment after Burton used the public address system to mock Rudd. When a victim of sexual harassment complains, the response cannot be "prompt and adequate" where the harasser is openly allowed to continue his harassment and announces to the entire department that the harassment is continuing.

F. The Compensatory Damages Should Be Reduced

In the alternative, the County contends that, if the court finds sufficient evidence to support the jury verdict, the compensatory damages awarded should be reduced.

"[A] jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990) (quotation omitted). Only where the amount awarded results from passion, bias, or prejudice or is so excessive as to shock the conscience of the court should the jury's verdict be reduced. *Id.* If credible evidence supports the jury's verdict, it should not be disturbed. *Id.*

The County argues that, because the most traumatic aspects of Burton's harassment of Rudd occurred before the County was given notice, $635,000 is more than the maximum amount that could be found compensatory. The County is correct that Rudd may not recover for the events which occurred prior to notice. *See Curry v. District of Columbia*, 195 F.3d 654, 664-65 (D.C. Cir. 1999) (Wald, J., concurring). However, credible evidence supports the jury's verdict as to Rudd's damages. The medical experts at trial testified that Rudd's psychological harm could not be compartmentalized, with each event assigned a percentage of the "blame" for Rudd's condition. There is no evidence before the court that the events before notice were the "most traumatic" in the sense that they were the greatest contributors to Rudd's harm. Further, there was testimony that Rudd's condition partially resulted from her perception of her supervisors' inability or unwillingness to stop the harassment after she made a complaint. The court will not disturb a jury award which is amply supported by credible expert testimony. Although it is difficult to assess damages in a case like this, the amount awarded is not beyond the maximum that could reasonably be awarded.

The award did not result from passion, bias, or prejudice and does not shock the conscience of the court.

G. The Jury's Award of Back Pay and Front Pay Should Be Vacated

The County argues that, because the most traumatic aspects of Burton's harassment of Rudd occurred before the County was given notice, she should not receive back pay or front pay. The court has addressed this argument in part III.F *supra*.

H. The Award of Front Pay Should Be Vacated Because Rudd Failed to Mitigate Her Damages

Finally, the County argues that Rudd has intentionally limited her income and, therefore, cannot collect front pay. That contention is not supported by the facts of this case. The County cites *Roush v, KFC Nat'l Mgmt. Co.*, 10 F.3d 392 (6th Cir. 1994), arguing that Rudd, like the plaintiff in *Roush*, voluntarily decided not to seek alternative employment in order to receive a payment from a governmental entity. Roush, having been wrongly terminated from her job with KFC, decided to work part-time, when she could have worked full-time. *Id.* at 400. She made her decision because her Social Security benefits would have been reduced had she worked full-time, and she would not have received more money despite working more hours. *Id.*

The County argues that Rudd, like Roush, decided to limit her income to receive a government payment. Unlike Roush, however, Rudd receives a disability pension because she became disabled on the job (because of Burton's

harassment). The County's own medical experts testified that Rudd was disabled and should not return to work in law enforcement. Rudd did not "voluntarily" limit her income in order to receive a disability pension. Either Rudd was disabled and entitled to the pension, or she was not. Rudd made no decision to limit her income, beyond the decision to follow the advice of the County's doctors that she was unfit to return to work. The County cannot argue that Rudd should have returned to work, thus mitigating her damages, when its own experts declared her disabled.

There was testimony that Rudd could return to the workforce in a field other than law enforcement. Rudd's qualifications for other employment, however, are minimal, and the expert testimony indicated that she could not expect to earn more than $15,244 annually, as opposed to the approximately $40,000 annually she made in law enforcement. Based on those figures, plaintiff's economics expert estimated Plaintiff's lost front pay at somewhere between $237,850 and $526,874. The lower figure took into account potential disability payments, while the higher figure assumed a salary of $15,244 annually. Thus, the testimony presented to the jury as to lost front pay assumed mitigation of damages. Although a plaintiff's award may be reduced for failure to mitigate damages, failure to mitigate does not deprive a plaintiff of the right to any recovery, assuming there are damages beyond what could have been mitigated.[4] *See In re Foote Mem'l Hosp./PCIS Litig.*, 1991

[4] *Roush* does not provide otherwise. The *Roush* court indicated that, had Roush mitigated her damages, no front pay award would have been necessary because her present salary would have been comparable to her previous salary. 10 F.3d at 400. Thus, Roush was barred from recovering front pay because mitigation would have eliminated her front pay damages.

WL 202613, at *9 (6th Cir. 1991) (stating that failure to mitigate is irrelevant where mitigation would not affect recovery); *Smith v. Manausa*, 535 F.2d 353, 355 (6th Cir. 1976) (holding failure to mitigate does not totally bar recovery). The jury's verdict of $308,208 was within the range presented to them and the court will not disturb a jury verdict supported by credible expert testimony. The court will, therefore, incorporate the jury's front pay award into the final judgment.

IV. Conclusion

For the foregoing reasons, the court DENIES Defendant's renewed motion for judgment as a matter of law, or for new trial, or for remittitur, or to vacate the award of back pay and front pay. Plaintiff's motion to incorporate jury's front pay award into final judgment is GRANTED.

So ORDERED this 22nd day of January 2004.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

No. 04-5939

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LATANUA RUDD, Plaintiff-Appellee, v. SHELBY COUNTY, TENNESSEE, Defendant-Appellant.	)	ORDER (Filed March 23, 2006)

BEFORE: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

s/ Leonard Green
Leonard Green, Clerk